No. 3656

United States

Circuit Court of Appeals

For Ninth Circuit

BALDWIN SHIPPING COMPANY, INC., a corporation,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

Brief for Appellant

Baldwin Shipping Company

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BRIEF FOR APPELLANT, BALDWIN SHIPPING COMPANY.

This is an appeal from a decree dismissing a libel in admiralty brought by appellant against the respondent and appellee, the Southern Pacific Company, for damages for breach of three contracts to reserve steamer space for certain pig iron, steel and tinplate for shipment from San Francisco to the Orient.

STATEMENT OF FACTS.

Appellant made three contracts with appellee in San Francisco in the summer of 1917, which, in so far as they are written, were introduced in evidence as Exhibits and are set forth on Pages 22 to 27 of

the record. The contracts related to 2000 tons of pig iron and steel, 2500 tons of pig iron and steel, and 3000 tons of tinplate respectively. The uncontradicted evidence shows that the bookings were arranged by telephone (Deposition of Mrs. Green, pp. 36-42) and were confirmed by letters from appellee. (Record Id.) The three agreements were admitted by the parties to be of similar character (Record p. 67) and for the purpose of determining liability, the first one was chosen by the court and the parties. The letters which passed on the subject of this contract were as follows:

"SOUTHERN PACIFIC COMPANY.

San Francisco, Cal., June 22nd, 1917.
No. 1.-E.—Contract 608.

Baldwin Shipping Company,
433 California Street
San Francisco, Cal.

Gentlemen:—

Confirming Phone Conversation.

We have booked for your account 2000 tons of pig iron and steel articles, inexcessive sizes, Japan late July August September, at $15.00 per ton, weight or measurement, ship's option.

This will be covered by Southern Pacific Contract 608.

Kindly confirm in writing,

Yours truly,
(Signed) J. G. STUBBS."

"BALDWIN SHIPPING COMPANY.

San Francisco, June 26th, 1917.
S. F. 1112.

Subject—2,000 tons steel articles—Japan.

Mr. J. G. Stubbs, G. F. A.,
Southern Pacific Co.,
San Francisco, Calif.

Dear Sir:

This will acknowledge receipt of your letter of June 22nd, File 1 - E contract 608, booking for the account of the Baldwin Shipping Company, 2,000 tons pig iron and steel articles, in-excessive sizes, Japan late July, August and September clearance at ocean rate of $15.00 per ton, weight or measurement, ship's option—covered by your contract 608.

You have advised us that just at the present time you cannot divulge to us name of steamer line with whom you have booked these 2,000 tons steel articles, but that you guarantee to protect $15.00 rate, and clear on first-class steamers carrying lowest rate of insurance, however, as soon as you are able to advise us with whom you have booked this freight; please do so in order that we may give instructions to our New York office, relative to the issuance of the bills of lading.

We will keep you advised of the forwarding of this business from the mills, and, if we can be of any further assistance to you, do not fail to let us know.

Yours truly,
(Sgd) BALDWIN SHIPPING COMPANY
J. H. S.

CC-NY. In routing this business do not fail to see that the S. P. is the terminal delivery line."

After the making of these contracts, the appellant repeatedly applied to the appellee for information

as to the name of the steamer or steamer line by which the commodities were to be exported, but could secure no information on this subject (Record, pp. 74, 77, 128-138). As a matter of fact the appellee did not book the shipments either with any steamer or steamship line at all, but with C. R. Haley & Company, a brokerage firm (Record, pp. 91-92), of which appellant knew nothing (*Id.* p. 75). Haley & Company, in turn, appear to have repeatedly failed to furnish appellee with the names of the steamers or lines on which the goods were booked (*Id.* pp. 97-98) and, as a matter of fact, for reasons unexplained, they wholly failed to carry out these sub-contracts. The consequence was that, when the commodities arrived in San Francisco, freight rates to the Orient had risen and appellant was compelled to pay considerably more than the $15.00 per ton, for which appellee had agreed to book the goods. All questions as to the amount of the damages were reserved and the only question presented was one of liability.

Under these facts, appellee contended in the lower court that it was not liable upon two grounds: (1) that it was a mere agent to reserve steamer space for appellant and performed its duty in that regard and (2) that, if its undertaking was more than this, the contract was repugnant to the Hepburn Act, against public policy and void. It is but fair to say that the last defense was an afterthought interposed for the first time on the day of the trial and that, at that time, the court did not appear to take it seriously. (Record pp. 66, 88.)

THE LOWER COURT'S DECISION.

The learned judge of the District Court, in an opinion of admirable brevity and clearness, summed up the facts of the case which he considered pertinent to his decision, namely, that the appellee was a common carrier engaged in interstate commerce which did not operate any steamers between San Francisco and the Orient and had never published or filed any through or other rates for such shipments with the Interstate Commerce Commission, "but in the course of its business as a matter of accommodation and to induce shippers to transport their freight and merchandise over the Southern Pacific lines, the company has reserved space on steamers destined for foreign ports for freight and merchandise carried over its lines to San Francisco for foreign shipment." The court then stated the salient facts of this case and the appellee's two lines of defense and held that there could be no recovery on either aspect of the case.

The court states that, if appellee was a mere agent to reserve steamer space, "there is no claim of a failure or breach of duty in that regard," which statement we dispute *in toto,* as will later appear. The court then further held, and this was the real ground of the decision, that, if the undertaking was an absolute and unconditional one, it was manifestly against public policy and void.

CONTENTIONS OF APPELLANT.

It is unnecessary to set forth in full the assignment

of errors in this case, which fully covers the points involved. Under them we shall contend:

1. That it was claimed in the lower court and is still claimed that, if appellee was a mere agent, it absolutely violated the first duties of an agent and that it cannot defend this case on the ground that it was such an agent. We shall also contend, under this head, that it was not agent at all and that its agreement to reserve space was an absolute agreement as a principal.

2. That the agreement in question was in no sense against public policy or void, or, as contended by appellee and impliedly held by the court, in violation of the Hepburn Act, and that appellee is, under the facts of this case, estopped from making any such contention.

I.

THE QUESTION OF AGENCY

All of the contracts in this case were, as previously stated, initiated and arranged by telephone conversations. The first and third contracts were reduced to the form of letters, the letters passing in regard to the first contract having been already set out and those in regard to the third being similar (except that the subject matter was 3000 tons of tinplate and the shipment dates September to December instead of July to September.) The rate in each case was $15.00 per ton (except as to the tinplate which was $16.50). The second contract was verbal; but it appears that the appellee sent to appellant a copy of its letter to C. R. Haley & Co. purporting to book *"for the Southern Pacific"* 2500 tons of pig iron and steel

(Record, pp. 24, 99.) Appellee also apparently made similar arrangements with C. R. Haley & Co. as to the first and third contracts, but it never notified appellant as to these arrangements (*Id.* p. 99) and, as a matter of fact, appellant paid no attention to this letter except to file it away, claiming at all times (and rightly so claiming) that its arrangements were with the Southern Pacific Company alone (*Id.* pp. 74-77).

It will be noted that in the first contract (the others being similar) the appellee states, "confirming phone conversation" that "we have booked for your account" and further stated that "This will be covered by *Southern Pacific Contract* 608." (Record, p. 23). It will further be noted that in appellant's reply, it stated that:

> "You have advised us that just at the present time you can not divulge to us name of steamer line with whom you have booked these 2,000 tons steel articles, but that you *guarantee to protect $15.00 rate,* and *clear on first class steamers* carrying the lowest rate of insurance, however, as soon as you are able to advise us with whom you have booked this freight please do so in order that we may give instructions to our New York office, relative to the issuance of the bills of lading."*

This understanding was never dissented from by appellee and, moreover, is borne out by the telephone

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**Note.*—This reference to the bills of lading obviously refers to the bills to be issued by appellant as a forwarding agent and not to the bills to be issued by the carriers. This is noted for the court's information, though not a matter of much importance.

conversations (Record, p. 41). It further appears from the testimony that the appellee itself and not the appellant took upon itself the clearing of the freight to the steamers under the previous bookings (*Id.* p. 94), thus showing that the responsibility for shipping the goods was wholly that of the appellee.

It is contended by appellee and stated by the court that the bookings were made by appellee as an accomodation to appellant and in consideration of appellant's giving it (the appellee) the inland haul. This fact does not clearly (or even at all as to these particular transactions) appear from the testimony, but we believe that, in part at least, it is the truth and we shall not (unless forced by our opponents to do so) dispute on this appeal that the appellee agreed to book these goods because of its being made the *terminal* inland carrier. This is partly borne out by appellant's statement at the close of its letters to appellee reading:

> "CC-NY In routing this business do not fail to see that the S. P. is the terminal delivery line."

This obviously means that appellant was instructing its New York office to make the Southern Pacific the terminal carrier for the equally obvious purpose of enabling *appellee* to carry out its contract to ship the goods under the bookings it had arranged to the Orient. This *only* meant, however, that the Southern Pacific was to be the *terminal* inland carrier and, of course, the goods had to pass over *other* lines before they reached the places (such as Ogden, Utah) where the Southern Pacific began its route.

We therefore have the following situation: Appellant, desiring (as a forwarder) to send goods of its clients to the Orient and having no facilities for arranging for anything but the inland haul, applied to the Southern Pacific to book the necessary steamer space; that the Southern Pacific agreed to do this, expressly guaranteed the rate and *itself* assumed the duty of clearing the goods; that, in pursuance of its contracts with appellant, it made sub-contracts with C. R. Haley & Co., *not* in appellant's name (which it would have done, had it been a mere agent), but in its own name—"Please book *for the Southern Pacific*"—and, finally, no claim that it was acting as agent and not as principal was made in any of its pleadings. It seems too clear for argument that the contracts of the Southern Pacific Company were absolute and unconditional and in no sense mere agency contracts. If this were not so, appellant's sole remedy would be against any person, however irresponsible, with whom appellee made its sub-contracts (and enough appears from the record to enable us to assert, as is in fact the case, that C. R. Haley & Company was and is totally irresponsible). No authority would seem necessary to support this plain proposition, but we believe that a careful consideration of the case of *Patterson et al. v. Baltimore Steam Packet Co.,* 101 *Fed.* 296 (affirmed in 106 *Fed.* 736), which is a typical case of "liner," or "berth term" booking contracts, will amply sustain our position.

Even on the assumption, however, that the contract was merely one of agency, it certainly is not

true, as stated by the District Court, that "there is no claim of a failure or breach of duty in that regard." It was contended by counsel for appellant at all times that the failure of the Southern Pacific to disclose with whom or on what steamer the bookings were made was a violation of its first duty as an agent and wholly estopped it from relying on the fact of agency (Record, p. 72, and see 2 Corpus Juris 714-715) and the testimony plainly shows repeated failures by appellee to comply with appellant's equally repeated requests to notify it on what steamer or steamship lines the goods were to go forward (Record, pp. 74, 77, 128-138). In the case of the *second* contract, appellee sent appellant a copy of its letter to C. R. Haley & Co., *asking* that concern to make the booking, but it was never confirmed to appellant that the booking *had been made* and, as regards the *first* and *third* contracts, no information as to even the booking with Haley was given (Record, pp. 75-78; 99). Moreover, as before pointed out, appellee did not and could not in law discharge its solemn obligation to reserve space on steamers by peddling out such business to an irresponsible broker.

We therefore contend that there is no question of any agency contract in this case and we pass to the question whether the appellee was restrained either by law or public policy from making the contracts in question, which, after all, is the vital and determinative point in the case.

II.

WERE THE CONTRACTS AGAINST LAW OR PUBLIC POLICY?

In order to answer the above question, it is necessary to first place before the Court the actual facts, even at the risk of repetition. The District Court says that "$10,000.00 damages is claimed for failure to reserve the space or transport the freight described in the first cause of action, and if this liability is enforced, *the obvious result will be that the libelee has transported freight over its own lines in the United States for* $10,000.00 *less than the lawful rate from which it may not depart*" and that the effect of this would be *"to nullify the provisions of the Interstate Commerce Act prohibiting discrimination."*

We can not too strongly assert that the above constitutes an absolute misconception of the true facts of this case. What are those facts? The testimony of Mr. Stubbs, appellee's general freight agent, who made the contracts in question, as to the company's general practice in such cases, is as follows:

> A. We had solicitors on the street in San Francisco, we also had solicitors in various cities in the eastern part of the United States, the more important cities, Chicago, Pittsburg, New York and places like that who were constantly making the round of firms who were known to be shipping either domestic business or foreign business; those shippers were called on for the purpose of soliciting the routing of the business over the Southern Pacific lines, and with respect to export business those solicitors in the course of that solicitation would—I speak

> now of the eastern solicitors more particularly —wire out to our General Freight office in San Francisco to obtain space, that is, ocean space, the ocean rate for a given quantity of tonnage that might be offered to them; the men on the foreign desk, either directly themselves or through the solicitors on the street would make inquiries of various steamship companies, would ascertain from them if they could book these various shipments that were offered; if so for what clearance and at what rate; in other words the usual details; that information would be wired back to the commercial agent or solicitor in the east, and if the space and rate was accepted a confirmation would be sent to us and we would exchange a confirmation with the steamship company for that space and at the rate quoted for that particular shipment. That was the ordinary detail and routine of handling it.
>
> Record, pp. 55-56.

In other words the appellee *never* entered into contracts with its customers for reserving ocean space, until it had made a definite agreement for both the space and rate with the steamship line or with some broker (*Id.* pp. 61, 90) and *then* it would quote that rate, *which it had already protected,* to its customers. Mr. Brown, an employee of the Southern Pacific who negotiated one of the contracts, put the situation very tersely when he stated that the ocean space situation in San Francisco at the time was speculative and *that the Southern Pacific did not speculate* (*Id.* p. 93). The evidence further shows that, *before* quoting any booking or rate to appellant, the appellee *actually obtained* that

booking and rate from C. R. Haley & Company (Record, pp. 92; 101).

In other words the appellee in this case did not stand to lose *a single dollar* by quoting a rate of $15.00 a ton to appellant. It simply obtained that rate from a broker, who stood in the place of an independent ocean carrier and *thereby fully protected itself*. If loss came to it through failure to obtain the space contracted for and it thus became liable in damages to appellant, that damage could at once be shifted to the steamship line or broker, from whom it had reserved space, and, in an admiralty proceeding such as this, such steamship line or broker could be brought in as a third party and made to respond to all damages awarded. We fail to see wherein such an arrangement in any way decreased appellee's inland freight rate or wherein it in any way nullified the provisions of the Interstate Commerce Act prohibiting discrimination. It may be said that such contracts *might* lead to discrimination, but these contracts *did not do so* and we are dealing with the facts of this case and not with those of some other case.

Of course it is quite true that, if appellee engaged ocean space with a party who was irresponsible or who would not live up to his contracts, it ran the risk of suffering a loss, but that is equally true of all contracts, whether by land or water, and obviously is beside the point. If C. R. Haley & Company is financially sound, appellee will suffer no loss in this case. If the concern in question is not financially sound, that is a vicissitude which is inherent in all

business transactions and suggests that perhaps ap-appellee was not as careful as it might have been in choosing its associates in this particular transaction. It offers no legal excuse, however, for an admitted breach of contract.

In the light of these admitted facts, we will now proceed to consider the applicable law and determine whether it in any way touches on this case.

The Interstate Commerce Act, passed originally in 1887, and as amended by the Hepburn Act of 1906 and by subsequent Acts, so far as the same is pertinent to the present inquiry, provides as follows:

Sec.1A. " That the provisions of this Act shall apply to . . . any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State . . . . to any other State . . . , and also the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment . . . " (24 Stat. L. 379, as amended by 34 Stat. L.584, 36 Stat. L. 544; see 4 Fed. Stat. Ann. 2 ed. 337).

Sec. 2. (Special rates, rebates, etc., prohibited) "That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it *charges,* demands, collects, or receives from any other person or persons for doing for him or them *a like and contemporaneous service in the transportation of a like*

kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty *of unjust discrimination,* which is hereby prohibited and declared to be unlawful." (24 Stat. L. 379; See 4 Fed. Stat. Ann. 2 ed. 371.)

Sec. 6A. Every common carrier *subject to the provisions of this Act* shall file . . . schedules . . . showing rates . . . between points on its own route and points on the route of any other carrier . . . by water when a through rate or joint rate have been established. If no joint rate over the through route has been established ,the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation . . . The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act." (24 Stat. L. 380, as amended by 25 Stat. L. 855, 34 Stat. L. 586. See 4 Fed. Stat. Ann. 2 ed. 406.)

It seems to us self-evident that these provisions do not apply to the case at bar. It will be noted that both Sections 1 A and 2 of the Act, in so far as quoted above, stand exactly as originally enacted in 1887, so that all decisions under the Act are equally applicable now and we contend that there are several decisions holding that contracts such as the instant one are not governed by the Act

The contract in this case is under the Act, if at all, only by virtue of the words italicized by us in our abbreviation of Section 1 A. The carriage was "partly by railroad and partly by water," but the carriage was *not* under a "common control, management or arrangement." The appellee had no interest whatever in the steamer to be employed, but only

a casual relationship thereto as a shipper thereon. The agreement for the water transportation was absolutely independent of the railroad carriage and appellee and C. R. Haley & Company, which stood in the place of the ocean carrier, had no standing agreement, but, as stated, a mere casual relationship.

It seems to be well settled that the Interstate Commerce Act is inapplicable to independent carriers by water. In *Ex parte* Koehler, 30 Fed. 867, 869, Judge Deady said:

> But the interstate commerce act does not include or apply to all the instrumentalities or agencies used or engaged in interstate commerce. It does not include any water craft unless it is used in connection with a railway, "under a common control, management, or arrangement, for a continuous carriage or shipment" from one state or territory of the United States to another, or to or from such state or territory from or to a foreign country.

And in Pacific Mail Steamship Company v. Western Pacific R. R. Co., 251 Fed. 218, 220, *this* Court, speaking through Judge Hunt, said:

> Inasmuch as it is beyond controversy that transportation and traffic by ocean carriers engaged in transportation to nonadjacent foreign countries is not defined or included in the act to regulate commerce, it must follow that the jurisdiction of the Interstate Commerce Commission cannot extend to carriers engaged in such traffic. In Cosmopolitan Shipping Co. v. Hamburg-American Packet Co., *supra,* the Commission recognized the limitations upon its jurisdiction where the question of control over ocean carriers was presented, and announced that the line must be drawn decisively between

those carriers whose rates and practices the Commission could control and those which it could not control, and held that *joint rates could not be made between carriers subject to the act and those not subject to it.* In Chamber of Commerce of New York v. New York Central & Hudson River R. R. Co., 24 Interst. Com. Com'n 55, the Commission, assuming it had no jurisdiction over ocean rates, said that rates to and from ports must be published as independent from the ocean transportation and are subject to the provision of the act to regulate commerce.

In obedience to the limitations referred to, reference may be had to rule 71 of the Interstate Commerce Commission Tariff Circular 18-A (subdivision "b"), wherein the Commission has explicitly declared that ocean carriers between ports of the United States and foreign countries not adjacent *are not subject to the terms of the act to regulate commerce, nor to the jurisdiction of the Commission,* and also to the provision that the inland carriers of traffic exported to or imported from a foreign country not adjacent must publish their rates and fares to the ports and from the ports, and that the rates must be the same for all, regardless of what ocean carrier may be designated by the shipper. The rule further provides that, "as a matter of convenience" to the public, the carriers of inland traffic may publish in their tariffs such through export or import rates to or from foreign points as they may make in connection with ocean carriers; but such tariffs must distinctly state the inland rate or fare as provided by the rules, and need not be concurred in by the ocean carrier, "because concurrence can be required from, and is effective against, only carriers subject to the act." Another subdivision authorized forwarding export and import traffic under through billing, but there must be separation of the liability of the inland and of the ocean carrier, and it must show the tariff rate of the inland carrier.

It would appear to be at once obvious from these cases, if it was not obvious before, that the Southern Pacific Company and C. R. Haley & Company (or in fact any independent ocean carrier) cannot be considered as connecting carriers operating under a "common control, management or arrangement." Each charged its own tariff over its lines and it is apparent that only connecting carriers by water under some sort of permanent arrangement with a railroad are covered by the Act.

In the lower court appellee relied strongly (as did the court itself in its decision) on the case of Hamlen v. Illinois Central Ry. Co., 212 Fed. 324. This was an action at law in the District Court for Eastern Arkansas and it was not appealed and has not since been cited, so far as we are aware, until cited in the case at bar. Not only do we believe the decision wrong and contrary to other cases, but it is readily distinguishable in that (1) through export bills of lading from inland points to Buenos Ayres, including the ocean rates, were issued at the inland points and (2) it was expressly stipulated that the railroad acted only as agent for the steamship line and was not responsible for the steamship carriage (see first paragraph of the decision). In the case at bar, however, the contracts were made *at the seaport,* San Francisco. Liability is absolutely distinct from any bills of lading and no provisions of any bills of lading were pleaded in this case nor did appellee offer any such bills in evidence as a matter of defense. The Hamlen case ruled through bills of lading, including

a low ocean rate, void—this suit is to determine the validity of a *contract to reserve steamer space.*

Moreover, we believe that the Hamlen decision is opposed in principle to two pronouncements of the United States Supreme Court. In Northern Pacific R. R. Co. v. American Trading Co., 195 U. S. 439; 49 L. Ed. 269, 278, that court said:

> "In the case at bar we hold that a special agreement is set forth to forward to Yokohama by the steamer leaving Tacoma on October 30th, 1894. If it had been made by the proper officer of a railroad company in the general course of its business we have no doubt, under the authorities, of the validity of the contract."

And in Southern Pacific Company v. Interstate Commerce Commission, 200 U. S. 536; 50 L. Ed. 585, 593, the same court said:

> It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier, and thus end its responsibility, and charge its local rate for the transportation. *If it agree to transport beyond its own line, it may do so by such lines as it chooses.* (Citing cases.) This right has not been held to depend upon whether the original carrier agreed to be liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, *it can do so upon such terms as it may agree upon;* at least, so long as they are reasonable and do not otherwise violate the law. *In this case, the initial carrier guarantees the through rate, but only on condition that it has the routing.* It was stated by the late Mr. Justice Jackson of this court, when circuit judge in the case of Interstate Commerce Commission

v. Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37, as follows:

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, *the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits.*"

Squarely oposed to the Hamlen decision and furthermore, strongly in point here is the decision of the Texas Court of Civil Appeals in *St. Louis Ry. v. Birge Forbes Co.,* 139 *S. W.* 3. In that case the defendant railway company contracted to transport cotton from Sherman, Texas, and Ada, Oklahoma, to seaport and thence by "first class liners," for which it would arrange, to Liverpool, and a *through rate* was agreed upon. The freight, however, went forward on second class or tramp ships and the action was for $1,812.00 to refund extra insurance paid in consequence. In affirming a judgment for the plaintiff, the court said:

"It appears that the contract entered into stipulated for a through rate and through shipment of the cotton in question from Sherman, Texas, and Ada, Oklahoma, to domestic seaports, and thence to foreign seaports; appellee having no

contractual relation whatever with the ocean carrier. This being true, *the contract,* we think, *was entirely legal, even though it be true, which does not appear, that the rate paid by appellants for the ocean voyage reduced the inland rate from the point of origin to the domestic seaport.*" . . .

"In the present case the proof, as we understand it, shows that there was no tariff promulgated covering the shipments of the appellee. *And, in view of the fact that the ocean rates are shown to be fluctuating and changing almost daily, it is quite difficult to see how a tariff could be filed covering such shipments as are involved in this case.* In the case of Texas & Pac. Ry. Co., v. I. C. C. 162 U. S. 197, 40 L. ed. 940, V. I. C. Repts. 405, it is held, in effect, that a contract for shipment from a foreign country, even though the proportion of the freight rate for the inland shipment from the domestic seaport to the interior destination in the United States is less than the regular tariff covering shipment between the inland port and such inland destination, does not violate the interstate commission law. If, therefore, a through rate infringing upon the tariff, as in the case referred to, is valid when applied to imports, there seems to be no good reason why it should not be held valid when applied to exports."

The railroad company in the case just cited issued through bills of lading and collected a single joint rate, which *might* tend to show some "common arrangement," whereas, in the case at bar, where two separate contracts are concerned, the transaction is, *a fortiori,* not within the Act. Moreover, in the case at bar, nothing whatever was pleaded or proved as to the nature of the inland contract. The sole contract here in issue was a contract to reserve space *from*

the seaport. The Southern Pacific may or may not have arranged the inland contract, but it was only the *terminal carrier* under that contract. It made no *through* rate, but only a rate from San Francisco to the Orient, which latter it protected by a supposedly valid sub-contract with another party and with no danger of loss if said other party was responsible.

As supporting the Texas decision, above cited we also refer to *Kemble v. Boston & Albany Ry. Co.,* VIII *I. C. Reports* 110 and *Cosmopolitan Shipping Co. v. Hamburg American Packet Co.,* XIII *I. C. Reports* 280-281.

We would further point out that a holding that either a *through* rate or *separate* rates must be filed from inland points to the Orient (unless the inland carrier controls an ocean route) would be not only untenable, but absurd. American rate schedules are voluminous, but can it be seriously contended that rates to all points in the whole world must be included? If the Southern Pacific agent in San Francisco should have been able to thumb his way to a quotation for Yokohama, so should he with equal alacrity quote rates to Tahiti or Apia in the South Seas or Fiume on the Adriatic. The violent variability of ocean rates and the fact that they are admitted by appellee's own witnesses to be *speculative* accentuates the absurdity of such a contention. Through quotations (or even separate quotations) are manifestly only related to ocean lines with which the American carrier has a common standing arrangement or over which it exercises some sort of continuous con-

trol. Nor, may we add, does the Hepburn Act call for schedules comprehensive of the universe.

We have thus far dealt primarily with Section 1 A of the Interstate Commerce Act and think we have shown that the case does not fall within that section and that hence Sections 2 and 6 A of the Act as heretofore quoted have no bearing on the situation. The authorities already cited would appear equally applicable to the two sections last named and a few words as to the effect of those sections would seem sufficient.

Reduced to its pertinent portions, Section 2 of the Act forbids "unjust discrimination," which exists if a common carrier (a) *charge* greater or less compensation than it (b) *charges* or *demands* from another for a like and contemporaneous service. It is to be noticed that these verbs are in the present tense and that *actual injustice and discrimination* only are in terms made illegal. Since infractions of the Act are punishable penally, it is readily apparent that *actual* and not *potential* discrimination is aimed at. No deliberate effort to rebate indirectly is imputed by the appellee to itself. On the contrary it is obvious that a fulfillment by the ocean carrier of its agreement made with the railroad for ocean transportation could not possibly have resulted in a loss to the railroad. Hence, even upon the argument employed by the court, no discrimination could in such event possibly arise. A loss to the railroad could only take place upon a concurrent happening of all the following contingencies:

1. That the ocean carrier failed to fulfill its space engagements;
2. That there was not available to the railroad similar ocean space at similar rates;
3. That the ocean carrier was financially irresponsible and unable to respond in damages to the railroad for its breach of contract.

Certainly it cannot be said that an agreement under such circumstances can be branded as illegal on the grounds of being discriminatory. It is not discriminatory in its inception and the possibility that a discrimination can result from it is not only highly uncertain, but extremely speculative. Other forwarding agents or shippers, for aught that appears, could at the same time have received a like service. It is intimated in the Hamlen case that the service of a railroad in booking goods for export and guaranteeing the rate "is an unusual service and not equally open to all," but the facts in the case at bar show on the contrary that it was *not* an unusual service and that it *was* equally open to all (See evidence of Stubbs heretofore quoted. Record, pp. 55-56.) In fact commerce today is being fostered by just such assistance rendered by carriers in booking foreign shipments on steamers beyond their seaport terminals and there is testimony in the record to show, as the court itself probably well knows, that it was "the universal custom" (Record, p. 105). In the light of this testimony and of the decisions of the United States Supreme Court heretofore cited, we fail to perceive wherein the service in question was "unusual" or wherein it was in any way discriminatory.

Turning now to Section 6A of the Act, we think we have already plainly established that this is not a case where any "through rate or joint rate have been established." The section further provides that, where no joint rate has been established "the several carriers in such through route shall file . . . the separately established rates . . . applied to such through transportation." The case at bar cannot come within this provision because of two facts. In the first place, the final carrier concerned was here a steamship company and not within the purview of the Act or the control of the Interstate Commerce Commission (See *Ex parte* Koehler, *supra;* Pacific Mail v. Western Pacific, *supra.*) In the second place, the record demonstrates that this was not a through transportation. The appellee was only *one* of the inland carriers and not the initial carrier at that, and its contract was a contract to reserve steamer space at a rate which it guaranteed. And, after all, Section 6A of the Act, as its closing sentence indicates, merely applies to carriers within Section 1A of the Act and has no separate sanctity standing alone.

One other point should be noticed, which was made in the Hamlen case, (although it was not made in this case in the briefs in the lower court) and that is the possible claim by appellee that its contract was *ultra vires*—that, as a *railroad* carrier, it had no power to guarantee an *ocean* rate, as the evidence shows it did in this case. It would seem to us to be elementary law that a claim of *ultra vires* must be both pleaded and proved by the party setting it up and there was

no such pleading or proof in this case. On the contrary the evidence is that appellee and other railroads were continually making contracts for ocean space and are doing so today and that it is "the universal custom." Furthermore, the United States Supreme Court has, as already noted, expressly said that railroad carriers have the right to make such contracts and they undoubtedly had that right at common law.

If the lower court's decision is sustained in this case, the railroads will be in an enviable position. Such contracts will then be void, but they will continue to be made and no prosecutions can be expected, as there have been none in the past. The railroads will simply be able to do as they have always done, with, however, the privilege of avoiding the contracts when convenient; in other words, doing what has now unfortunately become a common and alarming practice among supposedly reputable business men—"welching" (we dislike to use this term, but no other expresses the situation). As a matter of real fact, public convenience and business are served by these contracts and to take away the right to make them would involve commercial hardship. Public policy is better served by allowing them than by holding them void.

CONCLUSION.

The record shows that appellee in this case has broken its absolute contract to reserve steamer space at a rate which it guaranteed. It also shows that appellee does not stand to lose one dollar by carrying

out its contract, unless through its own carelessness in making its sub-contract with an irresponsible party. The contract was not against public policy, but was of mutual advantage and actually *favored* by public policy. The transaction was not within the purview of the Interstate Commerce Act, nor would it have been thereby invalidated, as it involved no unjust discrimination and the filing of either a through or separate rate was wholly impracticable in view of the constantly changing shipping conditions and was not prescribed by the Act. The contract was not one which the railroad could not make, but was one which railroads always have made and which they are still making today and without the assistance of which, distant shippers would be helpless.

It is therefore submitted upon the whole case that the decree of the District Court should be reversed and that said court should be instructed to enter an interlocutory decree in favor of the libelant, with interest and costs, and that the case should be referred to a Commissioner to ascertain the damages, appellant also to recover its costs on this appeal.

Dated: San Francisco, April 25, 1921.

Respectfully submitted,

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